In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6171

JOSEPH ODILON SECORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

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SUBJECT INDEX

TABLE OF CASES CITED

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STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

ARGUMENT

It is asserted in the first assignment that the Court erred in permitting cross-examination of ap-

pellant as to prior convictions. However, this claim of error is not argued in the brief of appellant, nor was an exception taken at the time of trial. (Tr. 14.) The assignment is without merit, particularly when the Government had already proved the prior convictions by its own witnesses. (Tr. 23 to 25.)

Such cross-examination is proper.

Smith v. U. S., 10 Fed. (2nd) 787 (C. C. A. 9);

Merrill v. U. S., 6 Fed. (2nd) 120, (C. C. A. 9).

Reception of evidence without objection and exception or motion to exclude is not reviewable.

Meyers v. U. S., 36 Fed. (2nd) 859;

Alvarado v. U. S., 9 Fed. (2nd) 385, (C. C. A. 9);

Sullivan v. U. S., 32 Fed. (2nd) 992.

The remaining four assignments all pertain to instructions of the Court claimed to give ground for reversible error. Appellant failed to note exceptions to the charge or any portion of it, nor did he request additional instructions. (Tr. 27 to 32.)

In the absence of an exception, assignments of error respecting the charge of the Court cannot be considered on appeal.

Smith v. U. S., 41 Fed. (2nd) 215;

Grillo v. U. S., 42 Fed. (2nd) 451;

Turner v. U. S., 32 Fed. (2nd) 126;

Blair v. U. S., 32 Fed. (2nd) 130;

Reger v. U. S., 37 Fed. (2nd) 74;

Sawyear v. U. S., 27 Fed. (2nd) 569, (C. C. A. 9);

DeBellis v. U. S., 22 Fed. (2nd) 948;

Cefalu v. U. S., 37 Fed. (2nd) 867.

Failure to charge the jury on specific principles of law cannot be complained of where the attention of the Court is not called to the omission.

Carroll v. U. S., 39 Fed. (2nd) 414.

Of the four assignments pertaining to instructions (which the Government contends should not be considered because of failure to note exceptions) the first is not argued in the brief.

Assignments III and IV affect instructions given with respect to evidence offered by the Government to uphold the possession count.

Physical possession of intoxicating liquor, unexplained, is prima facie evidence of ownership.

Melby v. U. S., 28 Fed. (2nd) 613 (C. C. A. 9).

As the transcript reveals, appellant thrice sold liquor to officers, the last sale being on the same day he was found in possession of liquor. (Tr. 19-21.) The defendant admitted that liquor found in two rooms of his hotel was his. (Tr. 21.) An officer took a pint bottle partially filled with whiskey from appellant's person when he was arrested. (Tr. 20.) He wanted to "fix it up" with the arresting officers. (Tr. 22.)

It would seem, in view of the overwhelming testimony tending to show unlawful possession of liquor by appellant, that he was in no manner prejudiced, assuming he was entitled to an unrequested instruction tending to bear out his "theory" of the case. Certainly his rather meretricious explanation (Tr. 26) that he found the liquor in a room; that it did not belong to him; that he "wanted to see what it looked like and throw it away" and that he supposed he "was going to see what was in it," in view of the incriminating circumstances, did not require the Court of its own motion to instruct the jury in accord with such a defense.

No substantial rights of appellant were thus affected.

Brown v. U. S., 9 Fed. (2nd) 589 (C. C. A. 9);

Carroll v. U. S., 39 Fed. (2nd) 414.

Assignment V asserts error as to an instruction as to nuisance. No exception was taken. No request for further instruction respecting the nuisance count was made. Therefore, error cannot be thus predicated.

Carroll v. U. S. (*supra*).

Appellant argues in his brief (page 7) a matter not assigned as error. Assuming this Court will consider alleged error without proper assignment, the contention argued is without foundation.

A Government agent was cross-examined by appellant as to the whereabouts of one Davis, an informer who assisted the agent in buying liquor from appellant on one occasion. Objection by the Government was sustained with the Court's proviso that if Davis was not produced as a witness, the jury would be instructed with respect to his absence. (Tr. 18-19.) Davis did not testify later, but appellant did not call the matter to the Court's attention. Testimony by Davis, if he had appeared, would have been merely cumulative. (Tr. 18.)

The failure to call Davis did not create an inference that his testimony would have been unfavorable to the prosecution.

"The rule has been much misunderstood, and is often misapplied. It does not obtain when the uncalled witness is purely cumulative, and when he was not in a better position to know the facts than those who were called."

DeGregorio v. U. S., 7 Fed. (2nd) 295.

Trial errors should be disregarded by an appellate court where the verdict is plainly the only one which the jury could rightly render.

Robinson v. U. S., 30 Fed. (2nd) 25;

White v. U. S., 30 Fed. (2nd) 590.

It is respectfully submitted that there is no substantial error in the record and that the guilt of appellant on all counts was abundantly proved beyond a reasonable doubt.

Respectfully submitted,

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